IN THE

Supreme Court of the United States

October Term, 1965

No. 290

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention by JOHN J. McCLOSKEY, Sheriff of New York City.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals, Second Circuit, dated May 11, 1965 (A. p. 62) which order affirmed the order of the United States District Court for the Southern District of New York dated March 17, 1965 which order dismissed a petition for a writ of habeas corpus.

Opinions Below

The opinion of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York is reported in 22 App. Div. 2d 683, 253 N. Y. S. 2d

401 (A. pp. 35-36). There were no other opinions in the State courts.

After being held in contempt a third time petitioner moved for a writ of habeas corpus in the United States District Court for the Southern District of New York. The opinion of the District Court is reported in 239 F. Supp. 419 (A. pp. 37-44). An appeal was taken to the United States Court of Appeals for the Second Circuit. The opinion has not yet been officially reported (A. pp. 49-58).

A previous petition for a writ of habeas corpus had been filed in the United States District Court for the Southern District of New York following the first conviction of contempt. The opinion is officially reported in 234 F. Supp. 25 (A. pp. 45-48).

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was made and entered on May 11, 1965. A further order of the United States Court of Appeals for the Second Circuit was made and entered on June 11, 1965 (R. 63) which continues the Petitioner-Appellant free in his own recognizance pending a determination by the United States Supreme Court as to the granting of certiorari.

Jurisdiction of this Court to review the order of the United States Court of Appeals for the Second Circuit by writ of certiorari is invoked under Title 28 of the United States Code, Section 1254 (1).

Jurisdiction of the United States District Court was based on Title 28 United States Code, Section 2254 in that there is an existence of circumstances which render State process ineffective to protect the rights of the prisoner.

There is a conflict in decisions of the United States Court of Appeals for the Second and Third Circuits.

In *United States of America ex rel Russo* v. *New Jersey* decided May 20, 1965 No. 14833 and not yet officially reported the Third Circuit released the prisoners because they were not advised that they had a right to counsel at the time of their arrest even though the prisoners did not ask for counsel. The Court below ignored petitioners claim that he was denied the right to counsel in that he wasn't informed by the lawyer representing the people that he had a right to counsel.

In addition, petitioner was deprived of his liberty and livelihood without due process of law, in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. In addition Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter are repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in that all public employees of the State of New York or its political subdivisions who claim a privilege against self-incrimination under the Fourteenth Amendment incur the penalty of forfeiture of their employment and are disqualified from holding any other public employment for a period of five years.

Article 1, Section 6 of the New York State Constitution is contained in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 1, Constitution, pages 67 and 68 of the pocket supplement (A. pp. 58-59).

Section 1123 of the New York City Charter is contained in New York City Charter and Code, Volume 1, Page 307, 1963 edition published by Williams Press, Inc., Albany, New York (A. pp. 59-60).

Questions Presented for Review

1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

2. Is it a denial of a right to counsel to compel a potential defendant to appear before a grand jury without having the lawyer representing the people advise the potential defendant that he has a right to the advice of counsel?

Statement of the Case

The facts of the case are thoroughly and concisely set forth in the opinion of Judge Weinfeld in the District Court (A. pp. 37-44).

Petitioner is presently free in his own recognizance by order of the United States Court of Appeals for the Second Circuit (A. p. 63).

Petitioner filed a petition with the United States Supreme Court for a writ of certiorari to the Appellate Division, First Judicial Department of the Supreme Court of the State of New York on June 3, 1965. The petition number is 1237 of October Term 1964. The petition of June 3, 1965 involved a first conviction for contempt while the present petition involves a third conviction for contempt.

Reasons for Issuance of the Writ

1. *The waiver signed by petitioner is invalid because it was obtained by coercion and was not a free and voluntary act.*

Under Article 1, Section 6 of the New York State Constitution all public employees of the State and its political subdivisions enjoy second class status if they claim their privilege against self incrimination. Failure to sign a limited waiver of immunity results in the imposition of a penalty for claiming a Constitutional right. The employee loses his position, pension rights and the right to work in public employment for the next five years.

Stevens when called before the grand jury signed a waiver of immunity rather than lose his position after eighteen years of service with only two or more years to go in order to retire on a pension.

Prior to 1938 public employees in New York State were first class citizens under the State Constitution in that they were free to claim their privilege against self incrimination the same as private citizens in the State and the same as all citizens in a Federal proceeding.

At the New York State Constitutional Convention of 1938 the Constitution was amended to provide that any public employee who claimed his privilege would lose his job. This change in the Constitution was held valid by the highest court of New York in the case of *Canteline* v. *McClellan*, 282 N. Y. 166 (1940). At page 170 the Court stated:

> "The people of the State may write such provisions into their Constitution as they see fit, without let or hinderance, subject only to the applicable portions of the Constitution of the United States. As

> to immunity from self-incrimination, there is no such applicable provision and such grant could have been omitted in its entirety from the present Constitution of our state. (*Twining* v. *State of New Jersey*, 211 U. S. 78)."

This was good law until *Twining* v. *New Jersey* was overruled by *Malloy* v. *Hogan*, 378 U. S. 1. This was also good law when this Court decided *Regan* v. *New York*, 349 U. S. 58, which case has been relied on by each of the three courts which have written opinions in this matter. It is submitted that a reconsideration of *Regan* v. *New York* in light of *Malloy* v. *Hogan*, will result in *Regan* being overruled.

The dissenting opinion in *Regan* by Mr. Justice Black and concurred in by Mr. Justice Douglas is premised on the contention that the privilege against self-incrimination applies to the States through the Fourteenth Amendment. Since this is now the law *Regan* v. *New York* should be overruled so that public employees will know that Constitutional protection does extend to them. This would be in accord with previous holdings by this Court in *Wieman* v. *Updegraff*, 344 U. S. 183; *Ullman* v. *United States*, 350 U. S. 422; *Slochower* v. *Board of Education*, 350 U. S. 551; *Torasco* v. *Watkins*, 367 U. S. 488. In *Orloff* v. *Willoughy*, 345 U. S. 83, 91, the Court stated:

> "It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertions by communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so."

In *Steinberg* v. *United States*, 163 F. Supp. 590 (1958) the Court of Claims declared unconstitutional a statute which required a retired government employee to testify before a federal grand jury involving his previous government employment or forfeit his retirement annunity. No appeal was taken but this decision was approved by this Court in *Sherbert* v. *Vernier*, 374 U. S. 398, 404 (1962).

If Stevens has a Constitutional privilege against self-incrimination then his waiver was wrongfully obtained. However Stevens should not have to take the risk of testifying in advance of a decision of this Court as to the validity of the waiver. To require otherwise would deny Stevens the practical protection of the Constitution and only give him a Constitutional right in theory.

2. *Petitioner was denied his Constitutional right to counsel.*

Stevens appeared before the Grand Jury as a compelled witness and as a probable defendant. The investigation had already focused on him. He was confronted by a lawyer representing the people. It is submitted that under these circumstances Stevens should have been advised by the lawyer representing the people that he was entitled to counsel. *Escobedo* v. *Illinois*, 378 U. S. 478.

This view has been upheld by the State of California in *People* v. *Dorado*, 42 Cal. Reptr. 169, 178, 398 P. 2d 361, 370 cert. denied May 1965 and in *United States of America ex rel. Russo* v. *The State of New Jersey* (United States Court of Appeals for the Third Circuit, No. 14833 decided May 20, 1965 and not as yet officially reported).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERARD E. MOLONY,
MOLONY & SCHOFIELD,
Attorneys for the Petitioner.

GERARD E. MOLONY,
Of Counsel.

APPENDIX

Petition for Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application

of

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention by JOHN J. MCCLOSKEY, Sheriff of New York City.

To: The Honorable Judges of the United States District Court for the Southern District of New York.

1. That he is the applicant above named and is now imprisoned and restrained of his liberty by the Sheriff of the City of New York in the State of New York, County of New York.

2. That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your petitioner is an order of the Honorable Mitchell D. Schweitzer, a Justice of the Supreme Court of the State of New York, in and for the County of New York, made on the 15th day of January, 1965, adjudging petitioner guilty of criminal contempt in which he was sen-

tenced to a term of 30 days and a fine of $250.00 and in default thereof to serve an additional term of 30 days.

3. Your petitioner has previously served two separate 30-day terms and paid the fine of $250.00 on each sentence by the same Supreme Court of New York County in which he appeared before the same Grand Jury and was asked the sole and identical question as the one that is now in the Mandate confining him for a third time in the County Jail. The repetition of such question was in violation of Double Jeopardy clause of the Federal Constitution.

4. The Mandate of Order adjudging him guilty of Criminal Contempt dated the 30th day of July, 1964, signed by the Hon. Charles Marks, a Justice of the Supreme Court was affirmed on appeal to the Appellate Division (253 N. Y. 2d 401) of the Supreme Court, First Judicial Department on the 30th day of October, 1964, and thereafter a motion was made to the same Appellate Division for leave to appeal to the Court of Appeals of the State of New York, which leave was denied. A motion was then made directly to the Court of Appeals of the State of New York asking for leave to appeal which motion was denied in a telegram received from the Court of Appeals on the evening of February 4, 1965.

5. Accordingly, your petitioner respectfully submits that all remedies available in the Courts of the State of New York have been exhausted.

6. The underlying facts leading to the issuance of the aforesaid application of criminal contempt of Court are as follows:

7. The First June 1964 Grand Jury of the County of New York commenced an inquiry to determine whether crimes of conspiracy to bribe a Public Officer and bribery of a Public Officer were committed in connection with enforcement of the gambling laws of the State of New York.

8. On the 25th day of June 1964, at 9:30 A.M., the petitioner, then a Lieutenant of the New York City Police Department was given a subpoena as a witness to report immediately to the New York County Grand Jury. A superior officer, Captain Jones, was assigned to take him to the Grand Jury. Outside the Grand Jury Petitioner signed a limited waiver of immunity on the advice of the Assistant District Attorney that he would lose his job if he failed to sign the Waiver. After signing the waiver outside the Grand Jury, the petitioner was brought before the Grand Jury and advised that he was now a possible defendant. No testimony was taken at that time except his identifying himself by name, address, rank and police command; nor was any relevant testimony ever given by him.

9. On his return on July 15, 1964, petitioner now for the first time was represented by counsel and when he was asked to sign a new limited waiver of immunity before the July Grand Jury, he refused. He asked at that time to withdraw the waiver he had signed before the June Grand Jury which he had signed on the advice of the Assistant District Attorney, stating he had been denied the right to counsel when he signed that waiver.

10. On July 16th, he received a letter from the Chief Clerk of the New York City Police Department informing him that his position as a Lieutenant with the New York

City Police Department had been taken away from him because he refused to sign a limited waiver of immunity before the July Grand Jury.

11. An Article 78, which was brought in the New York County Supreme Court (Index No. 16871/64) by the petitioner against Michael J. Murphy, as Police Commissioner, to restore him to the title and position of Lieutenant with full pay and allowances retroactive to the date of dismissal. The Corporation Counsel of the City of New York, appearing as attorney for the Police Commissioner, in answer to the petition, has offered the petitioner his former position with full back-pay from the date of his removal.

12. Thereafter, on July 22, 1964, he was subpoenaed to appear before the original June Grand Jury and on that day he informed the Grand Jury that he had received notice that he was no longer a member of the New York City Police Department and his attorneys advised him that he had the Constitutional right not to testify unless he was given immunity. He was then brought before the Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who knowing that the petitioner had not received immunity, demanded that he answer the question since he had previously signed a limited waiver. The Court and the District Attorney refused to allow him to withdraw this waiver even though he was not represented by counsel and the advice given to him by an Assistant District Attorney, which amounts at most to a coerced waiver. Your petitioner has never been given a hearing to show the surrounding circumstances which lead to his signing the purported waiver on June 25, 1964. The question asked by Hon. Charles Marks on July 22, 1964, is the same

question asked by Hon. Mitchell D. Schweitzer on the 26th day of September, 1964, and again on the 11th day of January, 1965, which has caused your petitioner to be sent to Civil Jail on three occasions. That question is:

> "Did you during the last five years receive any money from bookmakers of policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

13. Your petitioner on all three occasions informed the Grand Jury and the Court that he was relying on his attorneys' advice not to answer any questions since no immunity was offered and that he intended to avail himself of the Constitutional guarantees provided by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

14. The District Attorney of the County of New York, under the guise of citing the petitioner for contempt of Court, is in fact using and abusing laws of the State of New York in an attempt to deprive the petitioner of the equal protection of the laws and to deprive him of his rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States. The Courts of the State of New York have failed to accord to Petitioner his Federal Privilege against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution as laid down by the Supreme Court of the United States in its decision of June 15, 1964, in the case of Malloy v. Hogan (378 U. S. 1).

14. A previous application for a Writ of Habeas Corpus was made to this Court on the 5th day of August,

1964, when petitioner was imprisoned on the first contempt. The Hon. William B. Herlands in a Memorandum Opinion dated the 14th day of August, 1964, denied the Writ principally because petitioner had not exhausted his State remedies. The Court, however, did recognize the far ranging Constitutional issues posed and stated it would require extensive research and mature deliberation, and thought it undesirable to rush in and summarily adjudicate these issues in a judicial race.

15. Your petitioner has exhausted all his remedies available to him in the State Court on his first Criminal Contempt and the petitioner as a practical matter cannot secure any relief except by this Court granting the Petitioner's writ. The only method by which your petitioner could proceed in the State Court is by an Article 78 proceeding and it would be impossible to secure a review in the State Courts within thirty days hence he is left without any remedy on these series of continuing attempts, except by this writ.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued directed to the Sheriff of the City of New York, State of New York, County of New York, commanding to have the body of petitioner, James T. Stevens, together with the cause of such imprisonment and restraint forthwith before the Court or officer granting said writ.

JAMES T. STEVENS

(Sworn to by James T. Stevens, February 8th, 1965)

Mandate of Order Adjudging Witness Guilty of Contempt

At a term of the Supreme Court in and for the County of New York, Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 15 day of January, 1965.

Present:

HONORABLE MITCHELL D. SCHWEITZER,
Justice.

———o———

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JAMES T. STEVENS, a witness before the First June, 1964 Grand Jury of the County of New York.

———o———

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, heretofore duly appointed and sworn, and it appearing to the satisfaction of the court that James T. Stevens, on January 11, 1965, after being duly summoned and sworn in the manner prescribed by law as a witness, in a certain mat-

ter pending before such Grand Jury whereof they had cognizance, against John Doe et al, for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there refuse to answer legal, proper and relevant questions which were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

> JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:
>
> *By Mr. Andreoli:*
>
> Q. What is your full name? A. With the rank?
> Q. Yes. A. Lieutenant James T. Stevens.
> Q. And where are you assigned? A. 11th Division, Brooklyn.
> Q. And you are a police officer of New York City Police Department? A. I am. I am.
> Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that? A. I do.
> Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that? A. I do.
> Q. Do you understand that under the Constitution of the United States you have the right to

refuse to answer any questions that might tend to incrimate you; do you understand that? A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that? A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that? A. I do.

Q. Are you prepared to sign a waiver of immunity? A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engets E-n-g-e-t-s, Avenue, Brooklyn? A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engets Avenue, Brooklyn—" There appears to be a signa-

ture, "James T. Stevens," is that the—your signature? A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you? A. I did, sir.

Q. And you understand the import of it? A. I do.

Q. And was this signed in the presence of a notary? A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that? A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it? A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand

jury on July 1st with that questionnaire completed; do you understand that? A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

(A copy of Grand Jury Exhibit #16, referred to above, is attached hereto and made a part hereof.)

Thereafter, on January 11, 1965, James T. Stevens, appeared before the said First June, 1964 Grand Jury of the County of New York and the following took place:

JAMES T. STEVENS, recalled, further testified as follows:

By Mr. Andreoli:

Q. What is your name? A. James T. Stevens, S-t-e-v-e-n-s.

Q. Where do you live? A. 164 Engert Avenue, E-n-g-e-r-t, Brooklyn.

Q. And you are a former police lieutenant in the New York City Police Department; is that correct? A. That's right.

Q. Mr. Stevens, you have appeared before this grand jury on prior occasions? A. I have.

Q. Is that correct? A. I have.

Q. And on a prior occasion you were sworn to tell the truth; is that correct? A. That's right.

Q. And on that occasion, when you appeared before this grand jury, you were told the nature of the inquiry before this grand jury; is that correct? A. At this time, Mr. Andreoli, I would like to read into the record a statement, if you please.

Mr. Andreoli: May we have the record show the witness has removed from his pocket a card with some typewriting on it, from which he is now reading.

The Witness: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights under the fifth and fourteenth amendments of the United States Constitution; and further, that my attorney has advised me my rights under the fifth, sixth and fourteenth amendments of the U. S. Constitution have been violated and they, my attorneys, have presently this case pending before the Court of Appeals of the State of New York.

By Mr. Andreoli:

Q. Now, you say "this case pending." What case do you refer to, Mr. Stevens? A. The matter of my signing a waiver before this——

Q. What case is pending before the Court of Appeals of the State of New York? A. The matter of my signing a waiver before this particular grand jury.

Q. You understand, Mr. Stevens, and I believe you have discussed this with your attorney, that you have been held in contempt on two prior occasions; is that correct? A. That's correct.

Q. Once before the Honorable Justice Marks of the Supreme Court, State of New York; is that correct? A. That's correct.

Q. And that that matter was taken to the Appellate Division; is that correct? A. That's correct.

Q. And that subsequent to that, on a second occasion, you appeared before Judge Schweitzer and you were again held in contempt; is that correct? A. That's correct.

Q. Now, the matters with—in each case you were sentenced; is that correct? A. That's correct.

Q. Sentenced to thirty days and an additional thirty days in the event you failed to pay a fine of $250; is that correct? A. That's correct.

Q. And those sentences have been served; is that correct? A. That's true.

Q. And the fines have been paid; is that correct? A. That's right.

Q. And now when you say "this matter is pending before the Court of Appeals," you are referring then to those matters, I assume? A. No. To the original thirty-day commitment by Judge Marks, as far as I understand it. I am not a lawyer.

Q. When you say "this case," that is what you mean? A. Yes, sir.

Q. All right, sir. Fine. We are now before the grand jury, you are here before the same grand jury where you were sworn to tell the truth. Now, I show you Grand Jury Exhibit 16 and ask you whether or not the signature appearing on that paper is yours? A. That is my signature, but it wasn't executed in the Grand Jury; it was executed outside the grand jury prior to my appearing in this grand jury.

Q. And it was signed by you in the presence of Janet D. Winston? A. That's right.

Q. And Jerome P. Craig; is that correct? A. That's right.

Q. All right. Now, when you first appeared before the grand jury it was explained to you that this grand jury was inquiring into the crimes of conspiracy to commit the crime of bribery, namely bribery of police officers and bribery of police officers, in matters pertaining to the suppression of gambling; is that correct? A. That's correct.

Q. It was also explained to you—were you also asked, "Do you understand further that you have been called as a potential defendant and not as a witness? Do you understand that?" Was that question asked of you before the grand jury at that time? A. When I signed the waiver outside the grand jury——

Q. The question is—— A. Beg pardon?

Q. The question is, did you at that time answer to the question, "Do you understand further that you have been called here as a potential defendant and not as a witness? Do you understand that?" and did you answer, "I do?" A. Well, I would like to elaborate on that question, if I may.

Q. Did you answer that question at that time? A. I did.

Q. Had that also been explained to you—withdrawn. Was it also explained to you that under the New York State Constitution and—withdrawn. Was it explained to you that under the Constitution of the United States you had a right to refuse to answer any questions that might tend to incriminate you? Was that explained to you? A. Not outside prior to my signing the waiver of immunity.

Q. I am asking you about in the grand jury, not what you claim happened outside. Before the grand jury was that explained to you? A. That was.

Q. And before the grand jury was it explained to you that under the New York State Constitution and the New York City Charter a person who desires to continue in public office is required to sign a limited waiver of immunity? Was that explained to you before the grand jury? A. I don't—I don't recall that. It was explained outside that I was being called as a witness and that if I didn't sign the waiver of immunity——

Q. Do you now tell this grand jury that you do not recall having the New York City Charter and the Constitution of the State of New York—— A. I remember you mentioning the Constitution.

Q. Did you say before this grand jury that you understood that if you failed to sign a limited waiver of immunity that you could lose your job? That was not explained to you before this very body? A. I believe it was.

Q. Is there any doubt in your mind? A. No.

Q. And was it further told to you that it meant that if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you gave could be and will be used against you? Was that explained to you? A. I believe it was, yes, sir.

Q. And did you tell this grand jury you understood that? A. That's right.

Q. And at that time, after those things were explained to you, you were asked, "Are you pre-

pared to sign a waiver of immunity? Answer: I am." Is that correct? Is that what transpired? A. I—well, at this point I would like to put on the record what is said and what actually happens may appear to someone who later reads this——

Q. The fact of the matter, the waiver was signed outside after it was explained to you outside? A. That's right.

Q. Then you were asked these questions in the grand jury repeating what had happened before? A. That's correct.

Q. And you were asked if you were still ready to sign a waiver of immunity; isn't that correct? A. It's months back now. I can't remember word for word, Mr. Andreoli. I would only be kidding myself, I would be kidding my——

Q. Were you asked this question before the grand jury, just so the record is complete in this single proceeding; the question being:

> "When you signed this," referring to Grand Jury Exhibit 16, which you just identified, "did you understand that this was a waiver of immunity as I just described to you?"
>
> "Answer: I did, sir."

Were you asked that and did you give that answer? A. I believe so, yes, sir.

Q. And did you understand the import of it? Did you say you did? A. At that time I did not.

Q. Did you say you did? A. Well, I at that time——

Q. All right. Now, you understand now that you are appearing before this grand jury, therefore, that you are now under oath, that the inquiry does

pertain to conspiracy to commit the crime of bribery of public officers, namely, police officers, in matters pertainiing to the suppression of gambling; do you understand that? A. Yes, sir.

Q. You do. And do you understand further that you have appeared before Judge Schweitzer and the question as to whether or not you were required to answer questions was argued; is that correct? A. That's correct.

Q. And you understand that you were directed to answer on several prior occasions; is that correct? A. That's correct.

Q. All right. Now, so there will be no misunderstanding, you understand further that you are a potential defendant; you understand that? A. Well, you explained it to me, yes, sir.

Q. And do you understand further that regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity? Do you understand that? A. Yes, sir.

Q. Now, is there anything that you have been asked so far that you do not understand, Mr. Stevens? A. I wouldn't know how to answer that.

Q. Well, is there any questions in your mind that you wish to discuss with counsel before I proceed to the next question? A. Yes, I would, if I may.

Mr. Andreoli: All right. May we give this witness a moment to consult with counsel?

The Witness: Thank you.

(Witness leaves grand jury room at 2:58 p.m. and returns at 3:02 p.m.)

By Mr. Andreoli:

Q. Now, Mr. Stevens, you have conferred with counsel? A. That's right, sir.

Q. What is the name of the attorney who is outside the grand jury room? A. Mr. John Schofield, S-c-h-o-f-i-e-l-d.

Q. And he has been representing you for some time now; is that correct? A. That's right.

Q. Now, Mr. Stevens, during the last five years, while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York? A. I refuse to answer that question, Mr. Andreoli, on my rights under the fifth, sixth and fourteenth amendments of the Constitution.

Mr. Andreoli: All right. Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer, who is now the presiding justice there.

Foreman: So directed.

(The witness, foreman, Mr. Andreoli, Mr. McGuire and the reported leave the grand jury room.)

And the Court, on the said day, after hearing argument by John Schofield, Esq. of Molony & Schofield, counsel for the said James T. Stevens, and the District Attorney, by Peter D. Andreoli, Esq., Assistant District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason be-

ing given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following sets forth the pertinent parts of a proceeding which took place in Part 30 of the Supreme Court of the County of New York on January 11, 1965:

> Mr. Andreoli: If Your Honor pleases, continuing with the First June 1964 Grand Jury, Mr. George Lyons, Foreman, is present in court. Mr. James T. Stevens, witness before that Grand Jury, is in court with his counsel Mr. John Schofield.
>
> If Your Honor pleases, this grand jury, as Your Honor knows, has been inquiring into the crimes of conspiracy to commit the crime of bribery of public officials; in this instance, police officers in matters dealing with the suppression of gambling.
>
> This witness, Lieutenant—former Lietutenant James T. Stevens appeared before this grand jury on June 26, 1964. At that time he was a police officer of the Police Department of the City of New York. He was advised of his right—constitutional right, and so forth, and at that time signed a waiver of immunity and testified before that grand jury.
>
> I therefore offer first in evidence the—deemed marked—the grand jury testimony of James T. Stevens for the date June 26, 1964, at which time, as I see, he was sworn, signed a limited waiver of immunity after he was advised that he was a potential defendant in that investigation.
>
> I also ask to have deemed marked Grand Jury

Exhibit 16 which is the limited waiver of immunity signed by Stevens at that time.

The Court: Mark it—deemed marked.

(Whereupon, grand jury testimony of James T. Stevens for the date June 26, 1964, was deemed marked People's Exhibit 1 in evidence, as of this date.)

(Whereupon, Grand Jury Exhibit 16, limited waiver of immunity signed by James T. Stevens, was deemed marked People's Exhibit 2 in evidence, as of this date.)

Mr. Andreoli: Now, this is indicating an application on behalf of this grand jury for a direction to James T. Stevens that he answer following questions. He appeared before this grand jury this afternoon, at which time he was again advised of his rights and he was further questioned or, at least, questions were put to him. And he was asked the following question—and may I call the grand jury reporter so that that may be accurately stated.

Will you take the stand.

(Whereupon, Mr. Felixbrod took the witness stand.)

Mr. Andreoli: What is your name—will you swear him?

The Court: The Clerk will swear the witness.

GEORGE FELIXBROD, called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Andreoli:

Q. Where do you live? A. 1407 Sheridan Avenue, Bronx.

Q. And are you a grand jury stenographer, County of New York? A. I am.

Q. And were you assigned to the First June 1964 Grand Jury this afternoon? A. I was.

Q. And during the course of the proceedings before that grand jury, did the person now appearing before the Court James T. Stevens appear before that grand jury? A. He did.

Q. And at that time was he advised that he had been previously sworn before that grand jury? A. Yes.

Q. And he was advised of his rights, so forth; is that correct? A. That is correct.

Q. Now, at some point was a question put to the witness concerning his participation in possible conspiracy? A. Correct.

Q. And do you have the question that was asked of the witness? A. I do.

Q. Will you read that question, please. A. "Question: Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or oth r gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York?"

Q. What answer did the witness give, if any? A. "Answer: I refuse to answer that question, Mr. Andreoli, on my rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution.

"Question: All right.

"Mr. Andreoli: Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer who is now the presiding Justice there.

"The Foreman: So directed.

Mr. Andreoli: If Your Honor pleases, upon behalf of the First June 1964 Grand Jury, I request the Court direct this witness to answer the question which he refused to answer before the grand jury, that question being material and relevant and very important to the inquiry now pending there.

* * * * *

The Court: Well, I first make the affirmative finding of law and fact that the question posed of the witness is a legal—constitutes a legal and proper interrogatory within the purview of the appropriate sections of the—Judiciary Law I believe is Section 750 of the Judiciary Law, Subdivision 5. And I will make the direction that he return to the Grand Jury and answer that question.

Now, I would like to have you, Mr. Schofield, confer with your client to determine whether or not he is prepared to comply with the Court's direction, because if this is just a futile statement on my part, then I can make a determination.

* * * * *

The Court: Will you read back the question, Mr. Stenographer, which was asked of the witness and which he refused to answer before the grand jury.

The Witness: "Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit

these bookmakers, policy operators and gamblers to conduct their gambling operation in violation of the Penal Law of the State of New York?"

The Court: Do you want to repeat your application?

Mr. Andreoli: Now, may we have the witness directed to answer the question, Your Honor.

The Court: Now, having heard the question, the Court now directs you to answer the question.

Mr. Andreoli: May we inquire whether the witness intend to comply with the Court's direction and answer the question before the grand jury?

Mr. Stevens: May I answer it?

The Court: You may.

Mr. Stevens: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights under the Fifth and Fourteenth Amendments of the U. S. Constitution; and, further, that my attorney has advised me that my rights under the Fifth, Sixth and Fourteenth Amendments of the U. S. Constitution have been violated and he has presently this appeal pending before the Court of Appeals before the State of New York.

Mr. Andreoli: I ask for judgment on behalf of the grand jury.

The Court: The Court now adjudges the witness in contempt pursuant to the pertinent provision of the Judiciary Law and direct that he be confined in the Civil Prison for a period of 30 days and fined the sum of $250.00 and on failure of the witness to pay such sum he is to serve an additional 30 days. I will direct the District

Attorney to draw the appropriate mandate of the Court embodying the terms of this judgment. And I will direct the witness to appear before this Court on——

The Court: Friday at 3 o'clock, January 15th.

* * * * *

The witness James T. Stevens having on January 11, 1965, contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be committed to the custody of the Sheriff of the City of New York at Civil Jail, 434 West 37th Street, City and County of New York for a term of 30 days and said James T. Stevens be directed to pay a fine of $250 and in default thereof, to serve an additional term of 30 days at Civil Jail.

.....

J S C

Waiver of Immunity

The People of the State of New York

against

John Doe, et al.

I, Lt. James T. Stevens, residing at 164 Engert Ave—Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

James T. Stevens

Witness:

Jerome P. Craig

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON
Notary Public, State of New York
No. 03-4309493
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1965

Opinion of Appellate Division, First Department

22 App. Div. 2d 683

(253 N. Y. S. 2d 401)

Before:

BRIETEL, J. P., VALENTE, STEVENS, EAGER and BASTOW

Matter of Stevens, pet. (Marks, vs.)—Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the grand jury of New York County which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In Regan v. New York (349 U. S. 58), it was clearly held that one circumstanced as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to re-

fuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that Regan v. New York is controlling here, we do not reach the question as to the effect of Mallory v. Hogan, 378 U. S. 1 and Escobedo v. Illinois, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

Opinion of United States District Court for the Southern District of New York, Weinfeld, District Judge

The petitioner, until recently a lieutenant with the New York City Police Department, is in custody upon a third state court judgment of conviction for contempt,[1] arising out of his refusal to answer a question put to him by a grand jury investigating alleged police corruption. He seeks his release by Federal writ of habeas corpus on the ground that his rights under the Fifth and Sixth Amendments were violated when, given the choice under New York law either of executing a limited waiver of immunity or losing his job,[2] he signed the waiver. He did not then have the benefit of counsel. Having previously been twice convicted for failing to answer the same question, he also advances a further contention that his present imprisonment constitutes double jeopardy.

On June 25, 1964, petitioner was served with a subpoena commanding his appearance before a June grand jury of the Supreme Court, New York County. Before entering

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[1] To prevent expiration of petitioner's sentence pending decision, this Court issued a writ pursuant to which he was brought into Federal custody and, in the absence of opposition from respondent, released on his own recognizance. See Johnston v. Marsh, 227 F. 2d 528, 530 n. 4 (3d Cir. 1955).

[2] N. Y. Const. art. 1, §6 provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office * * *." A similar provision is contained in N. Y. C. Charter §1123.

the jury room, he was advised by an assistant district attorney that, pursuant to state law, unless he signed a waiver of immunity he would forfeit his job. He signed the waiver, whereupon he was brought before the grand jury, informed that he was a potential defendant and advised of his right against self incrimination and of state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity. He then acknowledged he had executed the waiver and understood its effect. Petitioner was sworn, asked his name and similar preliminary questions, and then given a financial questionnaire to complete and return. His next appearance was before a July grand jury, when, represented by counsel, he declined to sign another waiver and asked to withdraw the earlier waiver on the ground that he had not had time to confer with counsel prior to its execution. The following day he was discharged from the Police Department because of his refusal to sign a new waiver before the July grand jury. He was then summoned to reappear before the June grand jury (the one before which he had signed a waiver) and refused to answer any questions, including one with respect to alleged payments from bookmakers and policy operators. Upon reiteration of his refusal to answer before a Justice of the State Supreme Court, he was adjudged in contempt, sentenced to serve thirty days, and fined $250. Pending an appeal to the Appellate Division, he sought a stay of the sentence, which was denied.[3] When the Appellate Division affirmed his conviction[4] and leave to appeal to the

[3] Following this denial he applied for a writ of habeas corpus in this Court, which Judge Herlands denied for failure to exhaust available state remedies, which disposition was affirmed by our Court of Appeals.

[4] Stevens v. Marks, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1st Dep't 1964).

Court of Appeals had been denied, he had already served his sentence and paid the fine.

Upon expiration of his first contempt conviction, on September 28, 1964 he was again called before the June Grand jury and again refused to answer the question asked of him in July, whereupon he was held in contempt and sentenced to another term of thirty days and fined $250.[5] His third refusal to answer the question before the June grand jury resulted, on January 15, 1965, in his third summary conviction and imposition of a similar sentence.

[1, 2] It is the State's contention that section 2254 of Title 28, United States Code, requires dismissal of this application on the ground that petitioner has failed, with respect to this third conviction, to exhaust presently available state remedies by an Article 78 proceeding, although it recognizes that his unsuccessful state court test of the first conviction raised the same self-incrimination and right to counsel questions here pressed. This Court is of the view that the exhaustion doctrine does not require petitioner to go through the formality of a futile, time-consuming appeal each time he is adjudged in contempt for failure to answer the same question. Indeed, section 2254 expressly excuses resort to the state courts where, as here, there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." To require repeated and fruitless applications for state court relief would not only confine him to a revolving door process leading nowhere, but "invite the reproach that it

[5] Prior to surrender on this second conviction, petitioner sought to remove the proceeding to the Federal court for this district, pursuant to 28 U. S. C. §1443. Judge MacMahon dismissed the petition on October 20, 1964.

is the prisoner rather than the state remedy that is being exhausted." [6]

The State, however, is on firmer ground in advancing the exhaustion doctrine with respect to the petitioner's claim of double jeopardy. It was never presented to the state courts for consideration, presumably in light of a just decided New York Court of Appeals decision rejecting a similar argument.[7] It was first raised in the petition for the instant writ, but was neither briefed nor argued. In view of the Court's basis for its disposition of this proceeding, it is unnecessary to consider whether the recent state rulings, which seemingly are dispositive of petitioner's double jeopardy plea, relieve him of applying first to the state court before applying to this Court for relief on that ground.

[3, 4] A more basic question is presented, although the State does not raise it, by the circumstance that the petitioner still has ample time within which to challenge his first conviction in the United States Supreme Court. The New York Court of Appeals denied leave to appeal on February 4, 1965; thus petitioner has through May 5 to move for direct review,[8] but he has taken no such step. Fay v. Noia [9] overruled Darr v. Burford [10] to the extent

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[6] United States ex rel. Kling v. La Vallee, 306 F. 2d 199, 203 (2d Cir. 1962) (concurring opinion).

[7] Matter of Ushkowitz v. Helfand, 15 N. Y. 2d 713, 256 N. Y. S. 2d 339, 204 N. E. 2d 498 (1965), relying on Second Add. Grand Jury v. Cirillo, 12 N. Y. 2d 206, 237 N. Y. S. 2d 709, 188 N. E. 2d 138, 94 A. L. R. 2d 1241 (1963). Compare Yates v. United States, 355 U. S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957); People v. Riela, 7 N. Y. S. 2d 571 200 N. Y. S. 2d 43, 166 N. E. 2d 840, appeal dismissed and cert. denied, 364 U. S. 474, 915, 81 S. Ct. 242, 5 L. Ed. 2d 221 (1960).

[8] U. S. Sup. Ct. R. 11(1); 28 U. S. C. A. §2101(c).

[9] 372 U. S. 391, 435, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

[10] 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1960).

that it conditioned Federal habeas corpus relief upon a prior certiorari application to the Supreme Court. But whether a prisoner may now proceed directly in a Federal district court to collaterally attack his state court conviction when a remedy is still available in the Supreme Court, and further, whether in an appropriate case the district courts have discretion to require pursuit of such available Supreme Court review,[11] is less clear.[12] Consistent with the Supreme Court's view that the "needs of comity" are adequately served by the exhaustion of state remedies and by the availability to the states of eventual review in the Supreme Court of Federal habeas corpus decisions,[13] and that review by certiorari is more meaningful following compilation of a full and complete record by the lower Federal court, this Court concludes that a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him. However, the prisoner does not have an absolute right to bypass the Supreme Court. The district court, just as it has discretion to deny habeas corpus to a prisoner who has bypassed orderly state proce-

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[11] See Wade v. Mayo, 334 U. S. 672, 680-681, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948), overruled in Darr v. Burford, 339 U. S. at 208-210, 70 S. Ct. 587, but arguably resurrected in Fay v. Noia, 372 U. S. at 435, 83 S. Ct. 822.

[12] The question is sometimes avoided by the petitioner's waiting ninety days before seeking Federal district court relief. See Appendix, p. 19a. United States ex rel. Carthan v. Sheriff, City of New York, 330 F. 2d 100 (2d Cir. 1964). Imposition of such a ninety-day waiting period, however, seems contrary to Fay v. Noia's advocacy of "swift and imperative justice on habeas corpus." 372 U. S. at 435, 83 S. Ct. at 847.

[13] Fay v. Noia, 372 U. S. at 437-438, 83 S. Ct. 822.

dures,[14] also has discretion to require him to exhaust currently available Supreme Court remedies. And the circumstances of this case justify requiring the petitioner here to seek such review.

[5] First, an appropriate amendment by the New York Court of Appeals of its remittitur would enable petitioner to appeal from the contempt conviction as of right on the ground that a state statute was "drawn in question" and upheld over his Federal constitutional objections.[15] Secondly, failing to secure an adequate amendment to the remittitur to permit such an appeal as of right, petitioner would still be in a position to apply for certiorari; and in either event, bail could be granted.[16] Thirdly, unlike most such applications,[17] the petitioner's was prepared by counsel and presents an adequate basis for decision. Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim.

In Regan v. People of State of New York,[18] a New York City policeman was summoned before a grand jury investigating corruption. He, too, executed a waiver of immunity, then sought to repudiate it on the ground that at the time of its execution he was under economic duress

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[14] Id. at 438; 83 S. Ct. 822.

[15] 28 U. S. C. §1257(2). Of course, petitioner must apply for and obtain an amended remittitur indicating consideration and disposition of his Federal contentions. See Ungar v. Sarafite, 376 U. S. 575, 582-583, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

[16] 18 U. S. C. §3144; Hudson v. Parker, 156 U. S. 277, 284-287, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

[17] See Brown v. Allen, 344 U. S. 443, 492-495, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (separate opinion by Frankfurter, J.).

[18] 349 U. S. 58, 75 S. Ct. 585, 99 L. Ed. 883 (1955).

and unclear as to his rights. Regan was convicted of contempt, although by a jury, for refusing to answer questions put to him by the grand jury. The Supreme Court held that, where there was an adequate immunity statute, Regan had no constitutional right to remain silent, and that his contentions with respect to the waiver were premature. Said the Court:[19]

> "The waiver of immunity, although it does affect the possibility of subsequent prosecution, does not alter petitioner's underlying obligation to testify. Much of the argument before this Court has been directed at the question of whether the waiver of immunity was valid or invalid, voluntary or coerced, effectual or ineffectual. That question is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired.
>
> * * * * *
>
> "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify."

Petitioner's attempts to distinguish Regan are unpersuasive, the factual differences in the two cases appearing to have no relevance to the ground of decision there. Moreover, the Supreme Court last Term reaffirmed the basic premise underlying Regan: that valid state immunity legislation empowers a state to compel testimony

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[19] Id. at 62, 64, 75 S. Ct. at 587, 588.

which would otherwise be self-incriminating.[20] Unless Regan is to be overruled, resolution of petitioner's contentions concerning the validity of the waiver must await an attempt to prosecute him on the basis of compelled testimony,[21] or an adjudication with respect to his employment rights.[22] The District Court should not be called upon to divine whether Regan remains controlling authority. So long as an avenue to the Supreme Court is open, petitioner in these circumstances ought to avail himself of it.

The writ upon which petitioner was brought into Federal custody is dismissed and petitioner, having been released on his own recognizance pending determination of this proceeding, is directed to surrender to the State within five days.

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[20] See Murphy v. Waterfront Comm'n, 378 U. S. 52, 79, 93-100, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). The relevance of Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) is less clear, since the Regan court seems to have proceeded on the assumption that the self-incrimination clause did apply.

[21] See People v. Guidarelli, 255 N. Y. S. 2d 975 (3d Dep't 1965).

[22] There is currently pending in the State Supreme Court petitioner's Article 78 proceeding to review his discharge. The State's answer contains an offer to restore petitioner to his position with back pay, provided he testifies pursuant to the waiver now under attack.

Opinion of United States District Court for the Southern District of New York, Herlands, District Judge

On June 26, 1964, the petitioner executed a limited waiver of immunity before the New York County grand jury, in accordance with the provisions of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter.

On July 15, 1964, he refused to testify before a grand jury, asserting that he wished to withdraw the waiver.

On July 22, 1964, when again subpoenaed before a grand jury, he renewed his request to withdraw the waiver of immunity; and he refused to answer any questions before the grand jury.

On the same day, he was brought before Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who asked the petitioner the following question:

> "Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

The petitioner refused to answer the question on the asserted grounds that his State and Federal constitutional rights privileged him to remain silent.

Petitioner was adjudged guilty of criminal contempt by Mr. Justice Marks on July 30, 1964. He was sentenced to serve a term of thirty days and to pay a fine of $250.

Execution of the mandate of order was stayed for five days to permit an application for a stay to the Appellate Division of the Supreme Court for the First Department.

The Honorable Bernard Botein, Presiding Justice of the Appellate Division, denied the application for the stay but granted an order allowing the petitioner to have oral argument of his appeal on September 9, 1964.

The petitioner commenced serving the term on August 5, 1964. This term will expire on September 4, 1964. He is presently confined in the New York Civil Jail.

On August 5, 1964, a writ of habeas corpus was allowed by this Court and made returnable on August 10, 1964, at which time the matter was argued.

This petition for a writ of habeas corpus is hereby denied for three interrelated reasons.

I.

[1] An Article 78 proceeding in the nature of an appeal (N.Y.C.P.L.R. Section 7801 et seq.) is now pending before the Appellate Division of the New York State Supreme Court for the First Department. That proceeding has been set down for argument on September 9, 1964. Therefore, this State remedy has not been exhausted. See, e. g., Shelton v. State of South Carolina, 285 F.2d 540 (4th Cir. 1961); People of State of New York ex rel. Epps v. Nenna, 214 F.Supp. 102 (S.D.N.Y.1963); People of State of New York ex rel. Cuomo v. Fay, 149 F.Supp. 352 (S.D.N.Y.1956); People of State of New York ex rel. Mito v. Jackson, 148 F.Supp. 757 (S.D.N.Y.1957).

[2] This Court considers the petitioner's claim that he has exhausted available State remedies to be of doubtful validity. The doubt is resolved in favor of a procedure

that affords the State courts an opportunity to determine the substantive questions of constitutionality raised by the petitioner. See Darr v. Burford, 339 U.S. 200, 204, 70 S.Ct. 587, 94 L.Ed. 761 (1950); United States ex rel. Kling v. LaVallee, 306 F.2d 199, 202 (2d Cir. 1962).

II.

[3] In extraordinary circumstances, the federal court may dispense with rigid compliance with the general requirement that State remedies be exhausted before invoking federal habeas corpus. Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952).

This requires an evaluation of the particular facts and circumstances on a case-by-case basis. See Frisbie v. Collins, supra, at 521, 72 S.Ct. 509.

[4] There is nothing extraordinary about the present situation. On the contrary, this appears to be a garden variety contempt case, where a municipal employee refuses to answer material questions before a county grand jury after having signed a limited waiver of immunity. The grant or refusal of a stay of execution of a criminal contempt sentence is an ordinary exercise of judicial judgment by the State courts. This is routine litigation.

III.

A frank and realistic appraisal of the present proceedings clearly indicates that the novel and far-ranging constitutional issues posed by the petitioner would require extensive research and mature deliberation. The practicalities of judicial administration, therefore, pointedly suggest that, by the time such a decision on the substantive constitutional issues were rendered, the same questions could probably be determined by the New York appellate courts.

The United States Supreme Court has repeatedly emphasized the necessity for a circumspect approach in dealing with sensitive matters of federalism, that is, federal-state court jurisdiction. See Darr v. Burford, supra; Fay v. Noia, 372 U.S. 391, 419-420, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

Were this Court to rush in and summarily adjudicate issues that will come before the Appellate Division of the State Supreme Court in less than a month, such procedure might take on the undesirable aspect of a judicial race.

These desiderata persuasively indicate that this Court, in the exercise of its discretion, should decline to grant the writ. See United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 46 S.Ct. 1, 70 L.Ed. 138 (1925).

The petition for the writ of habeas corpus is denied. So ordered.*

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* Motion for bail pending appeal from this order was denied by Circuit Judge Leonard P. Moore, August 21, 1964.

Opinion of the United States Court of Appeals for the Second Circuit

KAUFMAN, *Circuit Judge*:

The principal issue on this appeal is whether a municipal employee could properly refuse to testify before a state grand jury by merely asserting that he did not voluntarily waive the immunity from prosecution conferred by state law. Although the validity of the waiver executed by the petitioner, James T. Stevens, has yet to be determined, he has thrice been adjudged in criminal contempt for refusing, despite directions from two New York State Supreme Court justices, to answer questions propounded by the grand jury. Claiming that he had exhausted the state remedies available to contest his first contempt conviction, the petitioner applied for a writ of habeas corpus in the United States District Court to challenge the third conviction, which like the first two carries a sentence of thirty days' imprisonment, a $250 fine and in default of the fine an additional 30-day prison term. The District Court denied relief, alluding to a directly relevant Supreme Court holding, *Regan* v. *New York*, 349 U. S. 58 (1955), that any contentions respecting the validity of the waiver of immunity are, under such circumstances, premature and do not alter the underlying obligation to testify. We affirm.

The basic facts are undisputed, although seemingly complicated—as the following recitation will indicate—by petitioner's repeated efforts to test, in both the state and federal courts, his duty to testify. Stevens, a lieutenant in the New York City Police Department, was first served with a subpoena the morning of June 25, 1964, commanding his appearance as a witness before the First June 1964

Grand Jury, which was then investigating alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Outside the grand jury room, Stevens, without counsel at the time, was advised by an assistant district attorney to sign a limited waiver of immunity; otherwise, pursuant to the state constitution and city charter,[1] he would be subject to removal from office. Stevens executed the waiver and went before the grand jury. There he was informed that he was a potential defendant and advised of his privilege against self-incrimination and the state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity or else suffer disqualification from office for five years. Petitioner then acknowledged that he had already executed the waiver of immunity and understood its effect. He answered a few perfunctory questions, identifying himself by name, address, rank and police command, and was dismissed with instructions to return at a later date with a completed financial questionnaire.

On July 15, having been subpoenaed to appear before the Third July 1964 Grand Jury, Stevens—now represented and advised by counsel—declined to sign a new limited waiver of immunity prior to giving any further testimony before this grand jury. At that time he also sought to withdraw the waiver he had previously signed in connection with his appearance before the First June 1964

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[1] The New York State Constitution, art. I, sec. 6, provides in part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision may be found in New York City Charter §1123.

Grand Jury, claiming that he had been denied the right to consult with counsel when it was executed. As a consequence of these actions, Stevens received formal notice, the following day, that his employment as a police lieutenant was terminated.

One week later, on July 22, Stevens was summoned to reappear before the First June 1964 Grand Jury. He quickly informed that body of his discharge from the police department since his appearance on June 25 and his attorney's advice that, notwithstanding the waiver he had previously signed, he had a constitutional privilege not to testify unless immunity from prosecution was expressly conferred. He was then asked the following question which he refused to answer on the aforesaid ground:

> Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York?

Petitioner thereafter was directed by a judge of the State Supreme Court to answer the question and warned of the consequences if he persisted in invoking his purported federal constitutional privilege not to testify. Stevens remained steadfast in his refusal and was adjudged in criminal contempt.

While a review of this contempt citation was pending in the state courts but after expiration of the 30-day prison sentence,[2] Stevens was again subpoenaed on September 28,

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[2] While serving his 30-day sentence, Stevens applied to the United States District Court for a writ of habeas corpus, claiming that his privilege against self-incrimination and right to counsel had been abridged in the state court proceedings. Judge Herlands denied the petition, noting that an Article 78 proceeding in the nature of an appeal, New York Civil Practice Law and Rules §7801, was then pending before the Appellate Division and, therefore, Stevens had not met the general requirement, 28 U. S. C. §2254, that available state remedies be exhausted before invoking federal habeas corpus.

1964, to reappear for the third time before the same First June 1964 Grand Jury. Once more the question regarding receipt of payments from gamblers was posed and again petitioner persevered in his refusal to respond. This contumacious conduct led to a second judgment of criminal contempt, imposed by another judge of the State Supreme Court.[3]

During the period when petitioner was serving his second 30-day contempt sentence, the Appellate Division of the Supreme Court dismissed his petition seeking to annul the first judge's adjudication of contempt. *Stevens* v. *Marks*, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1964). The Court, citing the Supreme Court's decision in *Regan* v. *New York*, *supra*, held that Stevens' challenge to the validity or effectiveness of the waiver of immunity, although available as a defense in any subsequent prosecution which might arise from the grand jury probe, was not a sufficient justification for refusing to testify at this preliminary stage in the proceedings.

After Stevens completed serving the second sentence and while his motion for leave to appeal from the Appel late Division's adverse decision was pending before the New York Court of Appeals, he was subpoenaed, on January 15, 1965, to appear for the fourth time before the First June 1964 Grand Jury. He continued to persist in his refusal to testify, both before that body and in the

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[3] Instead of taking advantage of the five days afforded to apply to the Appellate Division of the State Supreme Court for a stay of execution of the second contempt conviction pending appeal, Stevens sought to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443. Judge MacMahon vacated and dismissed the removal petition, indicating that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance. He noted, moreover, that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right.

face of the judge's new direction. Accordingly, Stevens was adjudged guilty of criminal contempt for the third time and once more sentenced to 30 days' imprisonment, a $250 fine and in default thereof an additional prison term of 30 days. When the New York Court of Appeals subsequently denied leave to appeal from the judgment dismissing the petition to set aside the first adjudication of contempt,[4] Stevens—who was then in civil prison—filed his present petition for a writ of habeas corpus. Judge Weinfeld denied federal relief, but thereafter issued a certificate of probable cause and released petitioner on his own recognizance pending this expedited appeal.

I.

Initially, we note that by testing his first conviction in the state courts—raising basically the same issues now presented[5]—Stevens satisfied the predicate for federal habeas corpus review of his third conviction. The requirement that presently available state remedies with respect to the third conviction be exhausted does not apply where, as here, "circumstances [render] such process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. To

[4] An Article 78 proceeding by which Stevens seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal, is currently pending in the state courts. The Corporation Counsel's answer includes an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged.

[5] Stevens does claim, for the first time in this petition, that the third conviction subjects him to double jeopardy. But this contention was neither briefed nor argued here and, more important, never presented to the state courts for consideration. Insofar as the present petition is based on this claim, we hold that it is premature for failure to exhaust presently available state remedies. 28 U. S. C. §2254; *United States ex rel. Tangredi* v. *Wallack*, —— F. 2d —— (2 Cir. April 1, 1965); *United States ex rel. Bagley* v. *LaVallee*, 332 F. 2d 890, 892 (2 Cir. 1964).

require a needless, purely formal application for state court relief each time Stevens is adjudged in contempt for not answering the identical question would, as the District Court noted, "not only confine [petitioner] to a revolving door process leading nowhere, but 'invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.' "

The District Court did, however, in the exercise of its discretion, deny relief because at that time Stevens could still seek Supreme Court review, by direct appeal or certiorari, of the first conviction. It is not necessary for us to pass on the propriety of that ground for decision. On the last day possible Stevens successfully applied to Circuit Justice Harlan for an extension of time in which to file a petition for a writ of certiorari. But since this appeal has not been withdrawn and our resolution of the Constitutional issues might be of some assistance to the Supreme Court, to which these same issues will be presented in the certiorari application on the first conviction, we deem it appropriate to turn to the merits, a procedure dictated by sound considerations of judicial administration and the course of state litigation on the original conviction, which is in no way antithetical to the needs of comity in our delicately balanced federal system.

II.

The basic and crucial attack by Stevens on all the contempt convictions is grounded on his contention that he could not constitutionally be obligated to testify before a grand jury without an express grant of immunity from prosecution. He brushes aside the effect of the limited waiver of immunity, claiming that his privilege against self-incrimination and right to counsel were infringed when, under the compulsion of New York law and without

the benefit of proper legal advice, he executed the waiver in order to save his job.

But these contentions are, if we are to harmonize our holding with *Regan* v. *New York*, *supra*, prematurely advanced and cannot excuse Stevens' contumacious refusal, after repeated judicial directions, to cooperate with the grand jury. The facts of *Regan*—not significantly distinguishable from the instant case—deserve brief mention. Regan, also a member of the New York City Police Department, was summoned before a grand jury investigating the alleged association of municipal policemen with criminals, racketeers, and gamblers. At first, he too executed a waiver of immunity, but later—after his employment with the police department had been severed—reconsidered his original waiver and refused to answer the grand jury questions, claiming that the waiver was obtained by a "pattern of duress and lack of understanding." The Supreme Court upheld his conviction for criminal contempt, noting that the validity *vel non* of the waiver was "irrelevant" because, given a valid state immunity statute, there was no possible justification for not testifying.

That holding—its force unimpaired by intervening decisions—is dispositive of Stevens' claims. Justice Reed's exposition of the decision's rationale is significant: "The invalidity of the waver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify." 349 U. S. at 64. Indeed, if Stevens' waiver is defective because he should have had the advice of counsel before signing the instrument, or his federal constitutional rights were abridged by the state requirement that he sign a waiver to preserve his public office, or if he should have been permitted to withdraw the waiver, even then, as we

view the relevant provisions of the state penal law, immunity from prosecution will automatically follow.[6]

The question before us is, therefore, a narrow one: Should a witness be permitted to test the validity of a waiver of immunity prior to testifying before the grand jury? We hold that the resolution of any challenge to the waiver must abide the state's subsequent prosecution on the basis of the allegedly compelled testimony, if in fact that course is ever taken by the state. Although we recognize that the grand jury witness is thus placed in a quandary because he is not sure of the status of his waiver, this incertitude cannot bar the state from obtaining his testimony. "[T]he Constitution does not require," the Supreme Court has told us, "the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction... The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan* v. *New York*, 349 U. S. at 64.

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[6] The New York Penal Law §381(2) provides: "In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Section 2447(1) of the Penal Law provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein."

Furthermore, we do not regard *Regan* as having been weakened, much less *sub silentio* overruled, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964), which applied the Fifth Amendment's privilege against self-incrimination to the states via the Fourteenth Amendment due process clause. As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings. Moreover, *Malloy's* relevance is limited; if Stevens is eventually prosecuted, he can, relying on that decision, question the validity of his alleged waiver of the privilege against self-incrimination, urging as he does now that he was compelled to testify or forfeit his public employment by an unconstitutional state law. But see *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 558 (1956); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951); *United States ex rel. Carthan* v. *Sheriff*, 330 F. 2d 100 (2 Cir.), *cert. denied*, 379 U. S. 929 (1964). Chief Justice Warren foresaw the availability of the point upon a subsequent prosecution based upon the allegedly compelled testimony, when he wrote, in his separate concurrence in *Regan*, that "substantial federal questions may arise if the petitioner is again called upon to testify concerning bribery on the police force while he was an officer *and if he is thereafter* denied immunity as to any offenses related to the investigation." (349 U. S. at 65 (emphasis added).) We are not aware that it has ever been held that the privilege conferred by the self-incrimination clause of the Constitution creates an absolute right to remain silent under all circumstances in the face of a valid inquiry into official misconduct; rather, it is a shield which protects a witness from being compelled to give testimony which could be used against him in a criminal proceeding flowing from the grand jury testimony. See *Feldman* v. *United States*, 322 U. S. 487, 499 (1943).

Finally, we note that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). Because New York's immunity statute is adequate on its face, we do not believe that Stevens had any constitutional right to refuse to testify before the grand jury. His contempt convictions, therefore, were proper.

Affirmed.

New York State Constitution, Article 1, Section 6

§ 6. [Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of

any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York City Charter, Section 1123

§ 1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its terri-

torial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former* § 903.)

Waiver of Immunity

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JOHN DOE, et al.

I, Lt. James T. Stevens, residing at 164 Engert Ave. Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomina-

tion, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

JAMES T. STEVENS

Witness:

JEROME P. CRAIG

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON,
Notary Public,
State of New York,
No. 03-4309493,
Qualified in Bronx County,
Certificate filed in New York County
Commission Expires March 30, 1965.

Order of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of May one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. THOMAS W. SWAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES ex rel. JAMES T. STEVENS,
Relator-Appellant,

AGAINST

JOHN J. MCCLOSKEY, Sheriff of New York City,
Respondent-Appellee.

Appeal from the United States District Court of the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of June, one thousand nine hundred and sixty-five.

Present: Hon. J. EDWARD LUMBARD,
Chief Judge,

HON. THOMAS W. SWAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

U. S. ex rel. JAMES T. STEVENS,
Relator-Appellant,

v.

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent-Appellee.

A motion having been made herein by counsel for the appellant to stay the issuance of the mandate pending a petition for writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

A. DANIEL FUSARO
Clerk